

PROXY ACCESS AND THE INTERNET AGE: USING ELECTRONIC SHAREHOLDER FORUMS TO IMPROVE CORPORATE GOVERNANCE

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I. INTRODUCTION

On November 28, 2007, the SEC voted to amend federal proxy rules in two ways. The first amendment clarified the SEC's stance that corporations may exclude shareholder proposals for nominees to the company's board of directors from the company's proxy materials. The second amendment was designed to encourage the use of electronic communications between companies and investors. These SEC actions constituted a partial response to a longstanding debate concerning the role of shareholders in corporate governance.

This Note argues that innovative uses of web-based technology could resolve many contentious issues concerning shareholder participation in corporate elections and ultimately improve the quality of corporate board elections from the perspective of corporate boards and shareholders. Despite their early state of development, electronic shareholder forums present corporations with the clear opportunity for low-cost, beneficial interaction with shareholders. Web-based technology can be molded to fit a company's individual needs. With a proper investment of time and due consideration, electronic communications with shareholders stand to improve corporate performance without dramatically altering structures of corporate governance.

Part II of this Note reviews the legal developments and academic debate concerning the merits of shareholder participation in corporate elections from the angle of shareholder access to corporate proxy materials. Part III traces the development and use of electronic shareholder

forums as a means for enhancing shareholder participation in corporate elections and more generally in corporate governance. Part IV introduces electronic shareholder forums as a potential middle ground solution to the problems identified in the shareholder proxy access debate, and argues that the use of electronic forums present opportunities for improving corporate governance and relationships between shareholders, corporate boards, and management.

II. LEGAL DEVELOPMENTS CONCERNING SHAREHOLDER PROXY ACCESS

A. Shareholder Proxy Access

Debates concerning the appropriate role of shareholder participation in corporate governance are longstanding. In one of its most recent forms, the debate has centered on shareholder participation in the nomination of a corporation's board of directors.¹ The standard procedure for nominating and subsequently electing a rival board member requires shareholders to engage in a proxy contest. The costs associated with soliciting a sufficient number of votes to elect a rival candidate in a proxy contest are substantial.² In order to mitigate these costs, shareholders have attempted to amend corporate bylaws to allow shareholders to nominate rival board candidates and have those candidates placed directly onto a corporation's official proxy materials. The process for such an amendment usually involves a shareholder proposal to have the proposed bylaw amendment voted on in a shareholder meeting.

¹ See Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675 (2007) (arguing in favor of corporate governance reforms that will enhance shareholder participation in corporate elections); Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733, 743 (2007) (arguing against Bebchuk's proposed reforms).

² Bebchuk, *supra* note 1, at 688 (noting that the costs of waging a successful proxy contest often range into the hundreds of thousands of dollars).

Under the Securities Exchange Act of 1934 (the "Exchange Act"), a corporation can petition the SEC for permission to exclude certain shareholder proposals.³ The SEC gives its concurrence by issuing a "No-Action Letter" indicating that the SEC will not take action against the corporation if the corporation decides to exclude the proposal.⁴ The SEC's rules enumerate thirteen categories of shareholder proposals that a corporation may elect to exclude from its proxy materials. The "election exclusion," Rule 14a-8(i)(8), provides that a corporation may exclude a shareholder proposal "[i]f the proposal relates to . . . an election for membership on the company's board of directors or analogous governing body"⁵

B. AFSCME v. AIG

In *American Federation of State, County & Municipal Employees v. American International Group, Inc.*, the Second Circuit Court of Appeals faced the question of whether a corporation could justify the exclusion of a shareholder proposal to amend a corporation's bylaws to place shareholder nominated board candidates directly onto the corporation's proxy materials.⁶ The plaintiff in the case, the American Federation of State, County & Municipal Employees ("AFSCME"), a public service employee union, was a substantial shareholder in the insurance and financial services company American International Group, Inc. ("AIG").⁷ After AFSCME submitted the bylaw amendment proposal, AIG petitioned the SEC and received a "No-Action" letter based on the SEC's view that AFSCME's proposal related to a corporate election and therefore fell within the

³ Securities Exchange Act of 1934, 15 U.S.C. § 78a (1934); 17 C.F.R. § 240.14a-8 (2008).

⁴ See *Am. Fed'n State, County & Mun. Employees v. Am. Int'l Group, Inc.*, 462 F.3d 121, 124 (2d Cir. 2006) (explaining the process of petitioning the SEC for and receiving a "No-Action Letter").

⁵ Securities Exchange Act of 1934, 15 U.S.C. § 78a (1934); 17 C.F.R. § 240.14a-8(i)(8)); see also *AFSCME*, 462 F.3d at 125.

⁶ *AFSCME*, 462 F.3d at 123.

⁷ *Id.*

election exclusion.⁸ AIG then excluded the proposed bylaw amendment from the company's proxy statement.⁹

The Second Circuit rejected AIG's argument as well as the SEC's amicus brief argument and ruled that corporations could not exclude shareholder proposals seeking to amend a corporation's bylaws to open a corporation's proxy materials for shareholder board nominations.¹⁰ The decision resulted from the court's deference to an SEC interpretation of the election exclusion, initially offered in 1976, which narrowly construed the exclusion to apply only to shareholder proposals relating to an identified board seat in an upcoming election.¹¹ The court stated that AFSCME's proposal "establish[ed] procedural rules governing elections generally," and did not "relate to a particular election," and therefore fell outside of the election exclusion.¹² The court refused to defer to a more recent and broader SEC interpretation of the election exclusion, the interpretation that the SEC offered in its amicus brief, which argued that Rule 14a-8(i)(8) allowed corporations to exclude any shareholder proposal that "would result in contested elections."¹³

⁸ *Id.* at 124; Am. Int'l Group, Inc., SEC No-Action Letter, 2005 WL 372266 (Feb. 14, 2005).

⁹ *AFSCME*, 462 F.3d at 124.

¹⁰ *Id.* at 127-30.

¹¹ *Id.* at 126-30. (The court deferred to the SEC's interpretation of its own rule because, as a matter of administrative law, "[w]hen the language of a regulation is ambiguous, we typically look for guidance in any interpretation made by the agency that promulgated the regulation in question.").

¹² *Id.* at 129-30.

¹³ The court explained the administrative law principles that grounded its decision to defer to the 1976 ruling:

The SEC's first interpretation was published in 1976, the same year that it last revised the election exclusion. The Division of Corporation Finance (the "Division"), the group within the SEC that handles investor disclosure matters and issues no-action letters, continued to apply this interpretation consistently for fifteen years until 1990, when it began applying a different interpretation, although

C. The SEC Responds to the AIG Decision

In its November 2007 release and subsequent official rulemaking, the SEC effectively overturned the *AIG* decision by amending Rule 14a-8(i)(8) to clarify that corporations could exclude amendment proposals such as that seen in *AIG* under federal proxy rules.¹⁴ Now, "Rule 14a-8(i)(8) permits

at first in an ad hoc and inconsistent manner. The result of this gradual interpretive shift is the SEC's second interpretation, as set forth in its amicus brief to this Court. We believe that an agency's interpretation of an ambiguous regulation made at the time the regulation was implemented or revised should control unless that agency has offered sufficient reasons for its changed interpretation. Accordingly, we hold that a shareholder proposal that seeks to amend the corporate bylaws to establish a procedure by which shareholder-nominated candidates may be included on the corporate ballot does not relate to an election within the meaning of the Rule and therefore cannot be excluded from corporate proxy materials under that regulation

. . . . Because the interpretation of Rule 14a-8(i)(8) that the SEC advances in its amicus brief—that the election exclusion applies to proxy access bylaw proposals—conflicts with the 1976 Statement, it does not merit the usual deference we would reserve for an agency's interpretation of its own regulations. The SEC has not provided, nor to our knowledge has it or the Division ever provided, reasons for its changed position regarding the excludability of proxy access bylaw proposals. Although the SEC has substantial discretion to adopt new interpretations of its own regulations in light of, for example, changes in the capital markets or even simply because of a shift in the Commission's regulatory approach, it nevertheless has a "duty to explain its departure from prior norms"

Id. at 123, 129 (quoting *Atchison, T. & S.F. Ry. Co v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973)) (citation omitted).

¹⁴ Shareholder Proposals Relating to the Election of Directors, Exchange Act Release No. 56,914, 72 Fed. Reg. 70,450 (Dec. 6, 2007), available at <http://www.sec.gov/rules/final/2007/34-56914.pdf> (describing that Securities Exchange Act Rule 14a-8(i)(8) was amended so that a corporation may exclude a shareholder proposal "[i]f the proposal relates to a nomination or an election for membership on the company's board of

exclusion of a proposal that would result in an immediate election contest (e.g., by making or opposing a director nomination for a particular meeting) or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings."¹⁵ In essence, shareholders retain their right to elect directors but corporations have the ability to deny the use of company proxy materials as an avenue for electing rival board nominees.

D. Debate over the Merits of Proxy Access

Although the Second Circuit stated that its decision in the *AIG* case was grounded solely on principles of administrative law rather than policy,¹⁶ the scholarly debate concerning the merits of shareholder proxy access was fairly well developed at the time of the *AIG* case. This Note concentrates on the most recent strains of the debate as exemplified by leading scholars in the field. Lucian Bebchuk, professor at Harvard Law School, argues that increased shareholder participation in corporate governance would benefit corporations.¹⁷

directors or analogous governing body or a procedure for such nomination or election." *Id.* at 70453 (emphasis added).

¹⁵ *Id.*

¹⁶ *AFSCME v. Am. Int'l Group, Inc.*, 462 F.3d 121, 131 (2d Cir. 2006) ("In deeming proxy access bylaw proposals non-excludable under Rule 14a-8(i)(8), we take no side in the policy debate regarding shareholder access to the corporate ballot. There might be perfectly good reasons for permitting companies to exclude proposals like AFSCME's, just as there may well be valid policy reasons for rendering them non-excludable. However, Congress has determined that such issues are appropriately the province of the SEC, not the judiciary.").

¹⁷ See Bebchuk, *supra* note 1; see also Lucian A. Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. LAW. 43 (2003). A number of other scholars have made similar arguments concerning the value of shareholder participation in corporate governance as a general matter. See Julian Velasco, *The Fundamental Rights of Shareholders*, 40 U.C. DAVIS L. REV. 407 (2006) (arguing that shareholder rights to elect directors constitute a fundamental element of corporate governance and should be protected against efforts by directors to diminish those rights); Lawrence

Bebchuk asserts that corporate structures impede shareholders' ability to replace underperforming directors.¹⁸ Rival board nominees face substantial costs through having to alert and convince shareholders to vote in the election.¹⁹ Effective communication with shareholders is difficult and costly.²⁰ Dissatisfied shareholders and board nominees face a "public good" problem: "those who run a proxy contest have to bear the costs themselves, but they . . . capture only a fraction of the corporate governance benefits that a successful contest would produce."²¹ Shareholder access to proxy materials and the ability to replace corporate boards with shareholder nominees would, accompanied by some related reforms, mitigate these impediments to shareholder participation in the election process and motivate directors to better govern the corporation.²²

Opponents of shareholder proxy access have raised a number of concerns that call into doubt the benefits that would be provided by pro-shareholder reform. Martin Lipton

A. Hamermesh, *Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street?*, 73 TUL. L. REV. 409, 480 (arguing that "[s]tockholder-adopted by-laws . . . may prove to provide a meaningful source of influence over corporate governance . . ."); George Ponds Kobler, *Shareholder Voting over the Internet: A Proposal for Increasing Shareholder Participation in Corporate Governance*, 79 ALA. L. REV. 673 (1998); Carol Goforth, *Proxy Reform as a Means of Increasing Shareholder Participation in Corporate Governance: Too Little, but Not Too Late*, 43 AM. U. L. REV. 379, 448-50 (1994); Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811 (1992) (advocating legal reform to facilitate increased participation by institutional investors in corporate governance).

¹⁸ Bebchuk, *supra* note 1, at 688 ("[E]ven when shareholder dissatisfaction with board actions and decisions is substantial, challengers face considerable impediments to replacing boards.").

¹⁹ *Id.* at 689-93.

²⁰ *Id.* at 692 ("The important point to recognize is that shareholders cannot infer from a rival team's mounting a challenge that the rival directors would perform better. . . . [A] challenger that knows it would in fact perform better may still have to do a significant amount of work—and may still fail—to convince shareholders to vote its way.").

²¹ Bebchuk, *supra* note 17, at 45.

²² Bebchuk, *supra* note 1, at 695-711; Bebchuk, *supra* note 17, at 51.

and William Savitt, partners in the law firm of Wachtell, Lipton, Rosen & Katz in New York, assert that waste and disruption will be caused by an increase in the number of board election contests if shareholders can propose election related bylaw amendments.²³ They argue that shareholder proxy access may empower institutional and “special interest” shareholders that will have a propensity to nominate friendly directors that may not govern the corporation in the best interest of all shareholders.²⁴ The fear of being replaced by shareholder nominees could lead directors to focus on short term results that will please shareholders instead of the long term interests of the shareholders and the company.²⁵ Directors may be deterred from serving on corporate boards for fear of being replaced by dissident shareholders.²⁶ Finally, if election contests become

²³ Lipton & Savitt, *supra* note 1, at 743. *But see* Bebchuk, *supra* note 1, at 695 (advocating in favor of increasing the number of board election contests).

²⁴ Lipton & Savitt, *supra* note 1, at 744-46 (“Properly conceived, a director’s obligation is to manage the affairs of the corporation to ensure its sustainable long-term growth. But certain vocal shareholders, notably hedge funds and arbitrageurs, invest over much shorter time horizons—‘they are primarily financial engineers interested in the largest possible profit in the shortest period of time,’ who usually maintain ‘laser-beam focus on quarter-to-quarter earnings’—and they accordingly favor a short-term spike in the share price over long-term wealth creation.”) (quoting Robert G. Kirby, *Should a Director Think Like a Shareholder? (It depends on who the shareholder is!)* in *Directorship: Significant Issues Facing Directors*: 1996 at 6-1, 6-2 (Directorship Inc. & Inst. For Research on Bd. of Dir. Eds., 1996)); *see also* Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561 (2006); Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1764-65 (2006); *but see* Robert C. Pozen, *Institutional Perspective on Shareholder Nominations of Corporate Directors*, 59 BUS. LAW. 95, 96-99, 105-06 (arguing that increased shareholder involvement in corporate elections would lead institutional investors to act only in situations that will likely lead to improvement of the financial performance of the corporation).

²⁵ Lipton & Savitt, *supra* note 1, at 745-46.

²⁶ *Id.* at 747-48 (“[D]irectors today are subject to a wide variety of governance pressures, including shareholder litigation, increased

more frequent, Lipton and Savitt assert that the collective decision-making ability of boards will be weakened.²⁷ Ultimately, this side of the debate argues that corporate governance structures should be left alone and that pro-shareholder reform is unnecessary and would have a negative impact on corporate performance.

Finally, a third contingent has argued that while the specific merits of various proxy access proposals are open to debate, shareholders should be given the option of whether to amend a corporation's bylaws to permit proxy access.²⁸ The scholars in this group have taken various positions concerning the practical merits of proxy access bylaws,²⁹ but make a principled argument that:

[C]ompanies should be allowed to tailor governance arrangements to the companies' particular needs and circumstances. Blocking or impeding shareholder-initiated bylaw amendments concerning election procedures would greatly undermine private ordering in this important area.

regulatory and reporting burdens, increased exposure to personal liability, and the threat of an election contest in the extreme case. . . . [W]e . . . believe that 'the prospect of facing election contests on a regular basis could be the nail in the coffin for director recruiting.')

(quoting Martin Lipton & Steven A. Rosenblum, *Election Contests in the Company's Proxy: An Idea Whose Time Has Not Come*, 59 BUS. LAW. 67, 86 (2003)).

²⁷ *Id.* at 748-49.

²⁸ See COMMENT LETTER OF THIRTY-NINE LAW PROFESSORS IN FAVOR OF PLACING SHAREHOLDER-PROPOSED BYLAW AMENDMENTS ON THE CORPORATE BALLOT, Oct. 2, 2007, *available at* <http://www.sec.gov/comments/s7-17-07/s71707-119.pdf> (filed with the SEC in October, 2007) [hereinafter COMMENT LETTER OF THIRTY NINE LAW PROFESSORS]. The professors signing on to the comment letter hail from over twenty different law schools in the United States. See also Brief of Amicus Curiae Harvard Law School Professors Supporting Appellants, *AFSCME v. AIG*, 462 F.3d 121 (2d Cir. 2006) (No. 05-2825-cu), *available at* http://www.law.harvard.edu/faculty/bebchuk/Policy/AmicusCuria_Brief.pdf.

²⁹ COMMENT LETTER OF THIRTY-NINE LAW PROFESSORS, *supra* note 28 ("There is substantial disagreement among us regarding the substantive merits of proxy access bylaws and thus as to whether shareholders would benefit from adopting such bylaws.").

. . . Expanding the election exclusion of Rule 14a-8(i)(8) to allow exclusion of shareholder access bylaws in some or all circumstances would impose an outside preference against some governance arrangements permitted under state law. The proxy rules should not be used to impose such an outside interference.³⁰

III. DEVELOPMENT AND USE OF ELECTRONIC SHAREHOLDER FORUMS

For the 2008 proxy season, the SEC put the shareholder proxy access debate to rest. The SEC, which had argued for the corporation's ability to exclude the proposal in *AIG*, responded to the Second Circuit's decision in November 2007 by amending the federal proxy rules and effectively overturning *AIG*.³¹ The drive for increased shareholder participation in corporate governance, however, can also be seen in the context of electronic shareholder forums that have emerged over the past decade. In its electronic shareholder forum ruling, the SEC set out to encourage the use of electronic shareholder forums by amending federal proxy rules to clarify that (1) comments made in electronic shareholder forums will largely be exempt from federal proxy solicitation regulations, and (2) corporations will not be held liable under federal securities laws for comments posted by participants in online forums.³² By clarifying its stance on

³⁰ *Id.*

³¹ Shareholder Proposals Relating to the Election of Directors, *supra* note 14.

³² The SEC outlined the background and justification for addressing these two issues:

The amendments are designed to facilitate greater online interaction among shareholders by removing two major obstacles to the use of electronic shareholder forums. The first major obstacle to the use of electronic shareholder forums is the concern that a statement made by a participant in an electronic shareholder forum will be construed as a solicitation under the proxy rules. Section 14(A) of the Exchange Act requires that the solicitation of proxy voting authority be conducted in a fair, honest, and

informed manner. Any solicitation of proxies in connection with securities registered pursuant to Section 12 of the Exchange Act is subject to the filing and disclosure requirements of the Commission's proxy rules. In this regard, the Commission has broad authority to control the conditions under which proxies may be solicited so that it promotes "fair corporate suffrage." A necessary element of this authority is to prevent solicitors from obtaining authorization for corporate action by means of "deceptive or inadequate disclosure in proxy solicitations."

As defined by the Commission, the term "solicitation" encompasses not only a request that a shareholder execute a proxy, but also the "furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." As such, the proxy rules apply to any person seeking to influence the voting of proxies, regardless of whether the person is seeking authorization to act as a proxy. Both the courts and the Commission have construed this necessarily fact-intensive test broadly to bring within the ambit of the proxy rules any communication that, under the totality of relevant circumstances, is considered "part of a continuous plan ending in a solicitation and which prepare(s) the way for its success."

Therefore, we are adding a new exemption to Rule 14a-2 to state explicitly that Rules 14a-3 through 14a-6 (other than Rule 14a-6(g)), Rule 14a-8, and Rules 14a-10 through 14a-15 do not apply to any solicitation in an electronic shareholder forum if all of the conditions to the exemption are satisfied. Rule 14a-2(b)(6) exempts from most of the proxy rules any solicitation by or on behalf of any person who does not seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a shareholder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent, or authorization in an electronic shareholder forum that is established, maintained or operated by a company, shareholder, or a third party acting on a company's or shareholder's behalf.

A solicitation on an electronic shareholder forum will be exempt so long as it occurs more than 60 days prior to the date announced by the company for its annual or special meeting of shareholders. If the company announces the meeting less than 60 days before the meeting date, the

solicitation may not occur more than two days following the company's announcement. We are adopting the limitations to the exemption because, although an electronic shareholder forum should provide a medium for, among other things, open discussion, debate, and the conduct of referenda, the actual solicitation of proxy authority for an upcoming meeting should be conducted in full compliance with the proxy rules. Any proxies obtained prior to the application of our proxy rules will not benefit from the full and fair disclosure required under the regulations. . . .

. . . The second major obstacle to the use of electronic shareholder forums is the concern that one who establishes, maintains, or operates the forum will be liable under the federal securities laws for statements made by forum participants. With respect to the establishment of such forums, which can be conducted and maintained in any number of ways, new Rule 14a-17 clarifies that a shareholder or company (or third party acting on behalf of a shareholder or company) that establishes, maintains, or operates an electronic shareholder forum is not liable for statements made by another person participating in the forum.

The persons providing information to or making statements on an electronic shareholder forum, however, will remain liable for the content of those communications under traditional liability theories in the federal securities laws, such as those in Section 17(a) of the Securities Act and Section 10(b), Rule 10b-5, Rule 14a-9, and Section 20(e) of the Exchange Act. The prohibitions in the antifraud provisions against primary or secondary participation in fraud, deception, or manipulation will continue to apply to those supplying information to the site, and claims will not face any additional obstacles because of the new rule. Also, any other applicable federal or state law will continue to apply to persons providing information or statements to an electronic shareholder forum.

As adopted, new Rule 14a-17 provides liability protection for all shareholders, companies, and third parties acting on behalf of a shareholder or company that establish, maintain, or operate an electronic shareholder forum under the federal securities laws, provided that the forum is conducted in compliance with the federal securities laws, applicable state law and the company's charter and bylaws. The proposed rule would have applied only to companies

these two key issues, the SEC eliminated substantial legal uncertainty that previously accompanied the use of electronic forums. Part III of this Note reviews the various ways in which electronic shareholder forums have been used over the past decade and then examines the debate concerning the merits of electronic forum use.

A. Previous Experience and Commentary on Electronic Shareholder Forums

Electronic shareholder forums have not yet achieved widespread use in corporate governance and the commentary on forum use is sparse. This section reviews the various ways corporations have used electronic forums and outlines the arguments of proponents and detractors of the early versions of electronic shareholder forums.

1. Open Forums and Investor Message Boards

Internet based shareholder forums have been sponsored by companies such as Yahoo! and The Motley Fool but “[w]hat has been missing from [these early attempts] has been any meaningful connection to what actually goes on in

and shareholders, but we believe it is appropriate to expand liability protections to other types of forum sponsors or operators, such as Internet service providers and shareholder or corporate associations, acting at the request, and on the behalf, of a shareholder or company. As noted above, liability under the federal securities laws for statements made on an electronic shareholder forum is one area of concern for shareholders, companies, or third parties acting on behalf of a shareholder or company when making the decision about whether to establish such a forum. The main purpose of Rule 14a-17 is to protect the person establishing, maintaining, or operating an electronic shareholder forum from liability under the federal securities laws in much the same way that the federal telecommunications laws protect an interactive computer service.

Electronic Shareholder Forums, Exchange Act Release No. 57172, 73 Fed. Reg. 4450 (Jan. 25, 2008), *available at* <http://www.sec.gov/rules/final/2008/34-57172.pdf> (footnotes omitted).

[companies].”³³ Yahoo! provides individual message boards for companies on the Yahoo! Finance webpage, and any registered user can post comments. The result is largely spam commentary, making the message boards of little use to investors and companies.³⁴

2. Independently Conducted, Shareholder Sponsored Forums

A number of Internet based shareholder forums were instituted in 1999 under a program created by the New York Society of Security Analysts’ (“NYSSA”) Committee for Corporate Governance “to focus investor attention on the practical analysis of value enhancement opportunities associated with corporate governance and control issues.”³⁵ Gary Lutin, president of the investment bank Lutin & Co., was asked to consult on the creation of shareholder forums and has since managed a large number of them.³⁶ During the NYSSA forum program, an analyst driven forum was created for shareholders of Amazon.com, Inc. (“Amazon”) to address concerns about the quality and format of financial information being relied upon by investors in the company.³⁷

³³ Christopher Cox, Chairman, U.S. Sec. & Exch. Comm’n, Speech by SEC Chairman Cox: Electronic Shareholder Forum Rules; Codification of Interpretation of Rule 14(a)(8)(i)(8) (Nov. 28, 2007), <http://www.sec.gov/news/speech/2007/spch112807cc.htm>.

³⁴ Roundtable Discussions Regarding the Federal Proxy Rules and State Corporation Law, U.S. Sec. & Exch. Comm’n (May 7, 2007), <http://www.sec.gov/spotlight/proxyprocess/proxy-transcript050707.pdf> [hereinafter SEC Roundtable] (Paul M. Neuhauser, Professor, University of Iowa College of Law, arguing that electronic shareholder forums will not be meaningful for shareholders and management due to the lack of control over their content).

³⁵ ShareholderForum.com, NYSSA Summary Page, http://www.shareholderforum.com/nyssa/Published/nyssa_summary.htm (last visited Dec. 3, 2008).

³⁶ See ShareholderForum.com, Shareholder Forum Home Page, <http://www.shareholderforum.com> (last visited Dec. 3, 2008).

³⁷ Troy Wolverton, *Analysts Demand Answers from Amazon*, CNET NEWS, May 1, 2001, <http://news.cnet.com/2100-1017-256855.html> (describing early forum developments).

The forum was open to all Amazon shareholders and Amazon management participated. After the forum was independently created, Amazon took a leading role and revised the way that the corporation presented its financial information.³⁸ The forum also spurred Amazon to add additional independent directors to its board.³⁹

In 2001, Lutin managed a shareholder forum for shareholders of Computer Associates, Inc. ("CA") that was independently instituted to facilitate a bid to replace CA's board of directors.⁴⁰ The purpose of the forum was to define issues related to the election of the board, to solicit information from competing candidates, and to provide a means of direct communication with shareholders.⁴¹ The incumbent board kept their seats in the proxy vote that followed the creation of the 2001 forum.⁴² Lutin also managed a forum for an analyst seeking a spot on Lone Star Steakhouse and Saloon, Inc.'s board of directors in 2001, where "[t]he stated purpose of the Forum was to support shareholder rights to make informed decisions about the alternative board candidates, without endorsing either one."⁴³ In this case, the insurgent candidate won the board seat held by the company's founder and CEO.⁴⁴

³⁸ Tim Arango, *The Daily Interview: Holding Amazon's Feet to the Fire*, *TheStreet.com*, June, 21, 2001, <http://www.thestreet.com/funds/dailyinterview/1468414.html> (Gary Lutin describing the workings of the forum and Amazon's participation).

³⁹ *Id.*

⁴⁰ Forum Report: Initiation for Forum of Shareholders of Computer Associates, http://www.shareholderforum.com/CA/Forum2001/History/20010731_report.htm (last visited Dec. 3, 2008) [hereinafter *Computer Associates Forum Report*]; see also Alex Berenson, *Entrepreneur to Begin Proxy Fight for Computer Associates*, *N.Y. TIMES*, June 21, 2001, at C1 (describing developments in the proxy fight for control of Computer Associates).

⁴¹ Computer Associates Forum Report, *supra* note 40.

⁴² See Jerry Guidera, *Incumbents Keep Computer Associates Seats*, *WALL ST. J.*, Aug. 30, 2001, at B6.

⁴³ Replacing Unresponsive Directors, <http://www.shareholderforum.com/Library/replacements.htm> (last visited Dec. 3, 2008).

⁴⁴ *Id.*

Lutin has also managed forums in response to shareholder concerns about corporate business decisionmaking. In the case of Willamette Industries, Inc., shareholders instituted a forum to address a possible corporate combination.⁴⁵ After management refused to act on the proposed combination, two shareholders who participated in the forum instituted lawsuits against management and another shareholder participant announced that it would nominate candidates for the company's board in the upcoming proxy season.⁴⁶ Willamette's management responded to these actions by entering into the corporate combination that had spurred the creation of the shareholder forum.⁴⁷ In addition, Lutin managed a forum on behalf of shareholders of Provident Financial Corporation to provide investors with independent analysis of the value of a proposed merger.⁴⁸ Three independent reports on the value of the proposed merger were made available through the electronic forum.⁴⁹

Currently, shareholders of Verizon may participate in a shareholder forum.⁵⁰ The forum's objective is to raise issues and proposals concerning executive compensation.⁵¹ In November 2007, partially in response to forum activities, Verizon's board adopted a policy that will create an annual advisory shareholder vote on executive compensation.⁵²

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Special Program, http://www.shareholderforum.com/PVN/program_index.htm (last visited Dec. 3, 2008).

⁴⁹ *Id.*

⁵⁰ Shareholder Forum for Verizon Communications, Inc., <http://www.shareholderforum.com/vz/> (last visited Dec. 3, 2008); see also Gretchen Morgenson, *Hear Ye, Hear Ye: Corraling Executive Pay*, N.Y. TIMES, Jun. 17, 2007, § 3, at 1 describing the structure and purpose of the Verizon shareholder forum).

⁵¹ Shareholder Forum for Verizon Communications, Inc., *supra* note 50.

⁵² Press Release, Verizon Communications, Inc., Verizon Board Adopts Policy on Advisory Shareholder Vote Related to Executive Compensation

Amerco, Inc., one of the first companies to institute electronic proxy ("E-proxy") rules for the 2007 proxy season, created a shareholder forum for the distribution of proxy materials and general exchange of information between the company and shareholders.⁵³

3. Corporate Instituted Electronic Forums

Royal Dutch Shell ("Shell") instituted an electronic forum in 1998.⁵⁴ Because of lax constraints on forum participation, Shell was forced to close the forum in 2005 when effective participation ceased. After the failure of the first forum, Shell instituted a new forum program with much tighter controls.⁵⁵ Dell Inc. opened an electronic forum in the form of a weblog in July, 2006, called "Dell Shares," where employees and managers post comments about various aspects of the business.⁵⁶ Shareholders can respond directly to the posts in the forum. Although the weblog is loosely structured and perhaps not properly termed an "electronic shareholder forum," participation from employees and shareholders has been significant.⁵⁷ Commentary on Shell's forum efforts is sparse and due to the recent institution of the Dell forum, analysis has yet to emerge.

(Nov. 1, 2007), http://www.shareholderforum.com/op/Library/20071101_Verizon-release.htm.

⁵³ AMERCO: Home, http://amerco.com/new_developments.aspx (containing articles concerning developments related to the Amerco shareholder forum) (last visited Dec. 3, 2008).

⁵⁴ See Latham & Watkins, L.L.P., Corporate Governance Comment: A Practitioner's Guide to Electronic Shareholder Forums, Jan. 2008, at 4, http://blogs.law.harvard.edu/corpgov/files/2008/02/January_2008.pdf (for a brief description of Shell's efforts to create an electronic shareholder forum).

⁵⁵ *Id.*

⁵⁶ *Id.*; Dell Shares, <http://dellshares.dell.com/terms.aspx> (last visited Dec. 3, 2008).

⁵⁷ Brock Romaneck, *The IR Department as Bloggers: Welcome to the 21st Century!*, TheCorporateCounsel.net Blog, Jan. 18, 2008, http://www.thecorporatecounsel.net/blog/archive/2008_01.html.

4. Opposition to Shareholder Forums

Parties opposed to the development of shareholder forums raise many of the same objections seen in the debate over shareholder access to a corporation's proxy materials. Before MCI was acquired by Verizon in 2006, MCI had begun to develop a shareholder forum in order to address a number of corporate governance issues. The MCI forum was open to any shareholder holding more than one percent of the company's stock.⁵⁸ In 2003, Martin Lipton issued a comment letter stating that various MCI reforms, including the creation of an online shareholder forum, "would impose severe and unnecessary administrative burdens [and] threaten to divert the attention of the board and management away from the business of the corporation"⁵⁹ Commentators have suggested that shareholder forums will be prone to spam commentary and proliferation of useless comments, a problem that can be seen in the Yahoo! Finance forums, and that if communications were not anonymous, participation in forums would be discouraged.⁶⁰

The techniques for forming and using shareholder forums are highly uncertain. The use of the internet to facilitate business activity in general develops continuously. A corporation or group of shareholders interested in developing

⁵⁸ See Andrew Backover, *MCI Monitor Calls for Power Shift*, USA TODAY, Aug. 26, 2003, available at http://www.usatoday.com/money/industries/telecom/2003-08-26-mci_x.htm.

⁵⁹ Martin Lipton, Mark Gordon, & Laura Munoz, "Restoring Trust" or *Losing Perspective?*, Aug. 27, 2003, at 3, available at <http://www.realcorporatelawyer.com/pdfs/wlrk082803.pdf>.

⁶⁰ Electronic Shareholder Forums, Exchange Act Release No. 34-57,172, [2007-2008 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 88,043, at 85,883 (Jan. 18, 2008) ("Despite the generally favorable reaction, some commentators predicted that electronic shareholder forums might develop into the same types of shareholder chat rooms that exist today.") (citing comment letters from Bricklayers and Trowel Trades International Pension Fund, Green Century Capital Management, Social Investment Forum, and Walden Asset Management). This line of argument was also expressed by Professor Neuhauser during the SEC Roundtable. See SEC Roundtable, *supra* note 34, at 11. For a response to this criticism and concerns about anonymous participation in forums, see note 65, *infra*.

an electronic forum must deal with a lack of previous experience and face the risk that experimental use of electronic shareholder forums may take time and effort to develop into an effective tool of corporate governance.

5. Proponents of Shareholder Forums

Given the early stage of development of shareholder forums, commentary is sparse yet some corporate analysts have begun to suggest the possible benefits that may accrue to corporations and shareholders through the use of shareholder forums.⁶¹ The primary benefit provided by electronic shareholder forums is the opportunity for increased communication between a corporation's management and its shareholders.⁶² Electronic forums could assist dispersed, discrete shareholders to form coalitions in support of value enhancing proposals, while filtering out weak or costly proposals.⁶³ Forum technology is available for little or zero cost to corporations.⁶⁴ Technology is flexible so that corporations and shareholders could structure forums in

⁶¹ *Id.* at ¶ 85,832. During the rulemaking process, "[t]he majority of the public comment on the proposed amendments to facilitate electronic shareholder forums was favorable."

⁶² *See id.* at ¶ 85,831 ("The purposes of [the] new Rule . . . are to facilitate experimentation, innovation, and greater use of the Internet to further shareholder communications."); *see also* Shareholder Proposals, Exchange Act Release No. 56,160, [2007 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 87,935 at 85,133 (July 27, 2007). ("[A]n online forum, restricted to shareholders of the company whose anonymity is protected . . . could offer the opportunity for shareholders to discuss among themselves the subjects that most concern them, and which today are considered—if at all—only indirectly through the proxy process.")

⁶³ Electronic Shareholder Forums, *supra* note 60, at ¶ 85,836 (noting that "the majority of the amendments' benefits flow from the potential reduction in costs of collective action among shareholders and the potential reduction in costs in communications between shareholders and companies if there is more extensive use of electronic forums").

⁶⁴ *See* Dominic Jones, *Boards Should Adopt Shareholder Forum Policies*, IR Web Report (Jan. 10, 2008), <http://www.irwebreport.com/daily/2008/01/10/boards-should-adopt-shareholder-forum-policies/>.

ways that serve their particular interests.⁶⁵ Forum participation is possible year-round, widening the time frame for discussions among shareholders, management and directors well beyond the traditional shareholders meeting.⁶⁶ Although best practices for conducting forums have only begun to develop, enormous potential for innovative uses of technology exist. The SEC's clarification of the regulatory controls on electronic forum communication allows management and shareholders to communicate free from regulatory interference.

IV. SHAREHOLDER PARTICIPATION IN CORPORATE GOVERNANCE THROUGH ELECTRONIC FORUMS

Electronic shareholder forums possess great potential to provide a meaningful opportunity for shareholder participation in corporate governance at low cost to a corporation. Part IV of this note introduces the concept of electronic shareholder forums specifically within the context of the most contentious areas of the proxy access debate and argues that shareholder forums provide an opportunity to enhance the voice of shareholders while avoiding objections to pro-shareholder reforms. Depending on how electronic forums are used, they can function as a middle ground between proponents of significant reforms in corporate governance and staunch opponents of pro-shareholder

⁶⁵ Electronic Shareholder Forums, *supra* note 60, at ¶ 85,831 (citing comments from a number of participants in the roundtables held in May 2007, noting that electronic forums could be structured so that they could be used exclusively by eligible shareholders, potentially as "a polling mechanism to elicit the sentiments of the company's managers or other shareholders on various potential actions" This was done in such a manner as to allow anonymous participation with percentage share ownership revealed, thus allowing other participants to gauge the shareholder strength behind a given proposal).

⁶⁶ *Id.* ("With the use of electronic shareholder forums, shareholder participation and communication could be extended throughout the year, rather than only during the period leading up to companies' annual shareholder meetings.").

reform. Ultimately, electronic shareholder forums present corporations with an opportunity to improve corporate governance without dramatically altering roles of shareholders, managers and directors in corporations.

A. Introducing Electronic Forums Into The Proxy Access Debate

Communication between shareholders, management, and directors can facilitate an exchange of information that enhances the quality of corporate elections. Potential benefits from the use of electronic forums can be seen by introducing shareholder forums into the key areas of the proxy access debate.

1. Waste and Disruption

In the context of shareholder proxy access, opponents allege that substantial costs would be incurred if shareholder board nominees are included in a company's proxy materials.⁶⁷ Corporate boards would face an increased number of costly election contests which would divert the attention of the board from the business of the corporation.⁶⁸ This potential waste and disruption could be avoided through the use of electronic shareholder forums while also allowing shareholders to have an enhanced role in the corporation's board election process.

Forums can be structured to facilitate commentary specifically concerning a corporation's board of directors. Shareholders would have the opportunity to raise concerns, and boards would have the opportunity to respond directly. Unhappy shareholders could propose potential nominees within the forum and solicit commentary.⁶⁹ The difficulties of communication and persuasion of shareholders identified

⁶⁷ Lipton & Savitt, *supra* note 1.

⁶⁸ *Id.* at 743-44.

⁶⁹ Whether all shareholders could propose nominees or whether eligibility criteria for shareholder nominations could be imposed is a matter that forum creators and/or companies would have to address.

by Bebchuk⁷⁰ could be reduced substantially by the use of electronic shareholder forums that create a central, immediate means of communication with shareholders. The technology allows shareholders or a corporate board to take an informal vote concerning particular nominees.⁷¹ Corporate boards would have the ability to judge the level of support for a board candidate, and coordinate an appropriate response. Substantial defensive costs would only be incurred, presumably, when a board deemed a potential nominee to have strong support from shareholders.

The use of electronic forums to facilitate increased shareholder participation in board elections incurs some costs. Creation of an electronic forum has start-up costs, and for the forum to work efficiently and be free from the problems witnessed in message boards such as those used by Yahoo! Finance, a team of forum managers would have to be hired. Corporate boards and management are not required to participate in electronic forums, so there is no guarantee that even after efforts have been made to establish a forum, meaningful participation will result. As electronic forums achieve wider use, corporations may be pressured by shareholders to create policies and procedures for communication and to produce certain amounts of information. In this case, a substantive, continuing dialogue with shareholders could impose substantial burdens on directors and management. The extent of such a burden is, however, highly uncertain and would be best addressed by monitoring the issue as forums develop. In sum, new avenues of communication, and the new types of interaction they create, can reasonably be assumed to cause some amount of "disruption" within a corporation.

Corporations and shareholders considering adopting an electronic shareholder forum targeted towards corporate

⁷⁰ See Bebchuk, *supra* note 1, at 689-94.

⁷¹ In the SEC Roundtable Panel, SEC Roundtable, *supra* note 34, at 152-53, 156-57, the participants, namely Richard J. Daly of BroadRidge Financial Solutions and Stanley Keller of Edwards Angell Palmer & Dodge, discussed informal voting in electronic forums, referring to the concept occasionally as the "American Idol Model."

elections should account for the value of information that will flow not only to shareholders but also to corporate management and boards. Despite the costs of managing and monitoring a forum, the value of the information produced in a forum has great potential to outweigh forum costs and to reduce costs normally associated with corporate elections. In sum, "waste and disruption," although likely to a certain extent given the undeveloped state of electronic forums, does not appear to present a compelling argument against the use of electronic forums to enhance the role of shareholders in corporate elections. The electronic forum will likely empower both shareholders and directors in the election context, leading to higher quality, informed decision making.

2. Empowering Special Interests

Electronic forums also address the broad allegation that proposals and board nominees of large institutional shareholders potentially harm the long term interests of corporations and individual shareholders.⁷² A year round electronic forum provides an opportunity for shareholders and management to discuss and judge proposals from institutional investors. Concerns can be raised and debated. As corporations begin to rely on electronic forums, institutional investors will face pressure to justify their proposals and respond to concerns, which could improve the overall quality of such proposals from the perspective of the corporation and individual shareholders.

However, it must be conceded that "special interest" and large institutional shareholders will be the most likely participants in early versions of electronic forums.⁷³ Absent

⁷² See Lipton & Savitt, *supra* note 1, at 744-45; Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1764-65 (2006) ("Those institutions most inclined to be activist investors are associated with state governments and labor unions, and often appear to be driven by concerns other than a desire to increase the economic performance of the companies in which they invest.").

⁷³ Most of the forums described in Part I of this Note were instituted by large shareholders. For example, the MCI forum was limited to

developments in forum technology and techniques to encourage participation from retail shareholders, institutional investors and large shareholders are likely the only parties with the time and resources to make immediate use of electronic shareholder forums. Because these investors already possess sophisticated means for communicating with companies and shareholders, an electronic shareholder forum could potentially provide institutional shareholders with unnecessary and disproportionate influence over corporate governance matters and shareholder decisions. However, as electronic forums develop, the opportunity to share information supporting both sides of a contentious proposal and to debate proposals year round should work towards reducing the number of proposals and reforms that would benefit special interest at the expense of other shareholders. Again, it is important to note the electronic forum provides a two way conduit for information exchange and means for corporate boards and management, not only shareholders, to express their views. While any serious debate that emerges between a corporation and an institutional shareholder will likely result in significant costs to the corporation because of the need to make defensive arguments, the availability of a transparent forum in which the argument can take place should lead to long term value enhancing outcomes more often than not.

3. Short-Termism

Opponents of shareholder proxy access assert that shareholder access to proxy materials will result in the nomination of directors that favor short term shareholder

shareholders owning one percent or more of the company's stock. See Backover, *supra* note 58. Gary Lutin was interviewed by TheCorporateCounsel.net and explained that institutional shareholders were the primary, if not sole, participants in the forums that he has managed. See also Latham & Watkins, *supra* note 54, at 4-5 (describing some risks associated with electronic shareholder forums, particularly the possibility that institutional investors and hedge funds could use electronic forums to gain disproportionate influence over a corporation).

interests over the long term value of a corporation, a problem Bebchuk refers to as "short-termism."⁷⁴ Electronic shareholder forums provide an opportunity to flesh out these concerns before proposals or nominees reach the proxy voting stage. Forums would ideally be used to enhance the quality of information available to shareholders instead of altering the existing structure of corporate elections. Although forums have been used as a means to wage proxy contests, this tactic has not routinely succeeded in unseating an existing corporate board.⁷⁵ This is presumably the case, at least in part, because electronic shareholder forums provide both rival nominees and incumbent directors a means for low-cost communications with shareholders. Allegations of underperformance from rival nominees can be immediately and directly addressed by current directors. If anything, this increased flow of information suggests that the short-termism problem could be reduced by the use of electronic forums.

4. Impact on Recruiting Directors

The most significant potential benefit of the use of electronic forums is the opportunity provided to directors, managers, and shareholders to have enhanced information about the key governance concerns in a corporation. Creating a forum for direct communication between shareholders and management could counteract a trend toward "more defensive, more formal, and often less open" behavior that shareholder proxy access could cause.⁷⁶ Directors and management have the opportunity to provide information concerning contentious corporate actions, which should mitigate the need to act defensively.

⁷⁴ Bebchuk, *supra* note 1, at 723.

⁷⁵ The forum instituted for shareholders of Computer Associates, Inc. was used to facilitate a proxy contest. The rival nominee failed to replace the incumbent board. *See* Computer Associates Forum Report, *supra* note 40.

⁷⁶ *See* Lipton & Savitt, *supra* note 1, at 748.

The early stage of development of electronic forums remains an issue when considering the impact that they may have on recruiting directors. The uncertainties surrounding forums and ultimate impact could initially deter directors from serving on the board of a corporation with an active shareholder forum. At later stages of development, if forums develop and directors of companies that use them are required to participate in substantial ongoing dialogue with shareholders, there is a real risk that this unique, time-consuming requirement may deter directors from joining companies that employ electronic shareholder forums.

Yet, given the potential benefits of electronic forum use, the impact on recruiting directors should be positive. As mentioned previously, the use of an electronic forum will not alter the existing proxy voting process, but rather will provide an opportunity to exchange information and facilitate better informed proxy voting. A developed electronic forum could provide more security to directors by providing an efficient means of communication with shareholders.⁷⁷ Although it is possible that a continuing dialogue with shareholders could become burdensome to directors, at the current state of development, forums do not impose substantial burdens on directors and this concern could be addressed as a company's forum develops. In general, the potential benefits accruing to directors in companies that use electronic forums appear to outweigh the potential costs, although close attention should be paid to the burdens that will be imposed on directors as forums develop.

⁷⁷ Directors supporting electronic forums may well be seen as supporting an open, accountable corporate culture that will attract shareholders. The commentary provided by Latham & Watkins, L.L.P., *supra* note 54, notes that "[s]ome companies that are under particular scrutiny from investors and public interest groups may believe there is an investor relations benefit to establishing e-forums."

5. Effective Shareholder Participation in Corporate Elections

In numerous articles, Bebchuk identifies impediments to effective shareholder participation in corporate elections.⁷⁸ Electronic shareholder forums possess immediate potential to reduce the costs faced by rival nominees in communicating with and convincing shareholders of the merits of a rival slate of board nominees. Rival nominees would potentially face forum start-up costs and they would still bear the burden of notifying shareholders of the existence of the forum and of key exchanges. However, approaching the proxy contest through an electronic forum should be more efficient and cheaper than soliciting proxies by mail. The potential for well-developed, routinely used forums to reduce the costs associated with a proxy contest seems almost certain. As noted in Part II, although success is not common, rival board candidates have used electronic forums to wage successful proxy contests.⁷⁹

Although a rival candidate who must bear the costs of creating and managing an electronic forum for use in a proxy contest still faces a public good problem,⁸⁰ as the use of forums develops there will presumably be many instances in which a developed forum already exists for communication with shareholders. With communication costs lowered, the public good problem is mitigated.

Electronic forums also provide rival candidates with the opportunity to coordinate proxy contest expenditures with

⁷⁸ Bebchuk, *supra* note 1, at 688-94; *see also* Bebchuk, *supra* note 17, at 51-59.

⁷⁹ A successful proxy contest was waged for board positions in the case of Lone Star Steakhouse and Saloon, Inc., in part by using an electronic shareholder forum. *See* Replacing Unresponsive Directors, *supra* note 43. In a related instance, Amazon added a number of independent directors to its board after participating in an electronic shareholder forum. *See supra* notes 35-36.

⁸⁰ The "public good problem" in the corporate governance reform context, as noted in Part II, describes a situation where one party bears all the costs of imposing a reform but only captures a fraction of the benefits that the reform will produce.

the level of support for a candidate that could be gauged in an electronic forum. A robust electronic forum, where informal vote tallying is possible, would reduce the uncertainty associated with many proxy contests. As suggested above, this reduction in uncertainty works as a benefit for both rivals and incumbent board members.

For retail shareholders, electronic forums would provide a valuable information resource. Depending on a shareholder's willingness to invest the time necessary to make use of the forum, proxy votes should be more informed and ultimately better for the long-term performance of the company.

6. An Overview of the Shareholder Franchise in Electronic Forums

The debate over enhancing shareholder power in the proxy access context not only concerns the mechanics of proxy access, but also underlying theories about the role of a shareholder in corporate governance. Rather than supporting one side of the debate or a particular model of corporate governance, electronic shareholder forums present an opportunity for corporations to increase the effectiveness of existing corporate governance mechanisms by increasing the quality of information available to all parties and easing communications between shareholders, management and directors. Electronic forums can inform shareholders and enhance the quality of shareholder votes without causing substantial disruption to a corporation.

The lack of a clear template for instituting an electronic shareholder forum should be viewed as having negative and positive effects. Uncertainty amounts to a cost for corporations and shareholders that set out to make effective use of forums. Early forums have been used by large shareholders and special interests, not necessarily in the best interests of all shareholders and the corporation as a whole. Nevertheless, flexibility is the dominant feature of technology available to corporations and shareholders seeking to start an electronic forum. Electronic forums provide a real opportunity to "tailor governance

arrangements to the companies' particular needs"⁸¹ For the risk averse, significant controls could be put in place so that there is little risk of forum misuse, irrelevant participation, or fraudulent activity. As they develop, forum problems can likely be addressed rapidly through innovative policies, procedures, and forum uses. The potential benefits that could accrue to corporations and shareholders strongly justify, at a minimum, initial attempts and small investments in electronic forums by corporations.

B. General Forum Use

The SEC's clarification of ground rules for the use of electronic forums is relevant to corporate boards, management and shareholders. Given some demonstrated willingness on the part of shareholders to institute electronic forums, it appears likely that groups of shareholders will continue to create electronic forums.⁸² Corporate boards should begin to consider how they will respond to shareholder-created forums. Corporations that do not address the likely development of electronic forums face the risk of seeming "aloof or even unaccountable."⁸³ From the perspective of managers and directors, consideration of policies and practices that would facilitate electronic communications would be a wise investment.

The potential benefits of the electronic forum model are not limited to contested corporate elections. Forums can facilitate the exchange of information between directors and shareholders in most areas where shareholder votes play a part in corporate decision making, namely in the area of precatory proposals and major business decisions that require the approval of shareholders.⁸⁴ Thus, the costs faced

⁸¹ COMMENT LETTER OF THIRTY NINE LAW PROFESSORS, *supra* note 28.

⁸² See Jones, *supra* note 64.

⁸³ *Id.* (emphasis omitted).

⁸⁴ See Shareholder Proposals, *supra* note 62, at ¶ 85,133 ("[I]ndividuals and entities will find increasingly creative ways to address the challenges they face in presenting proposals to companies, determining support for proposals among other shareholders, conducting referenda on

by shareholders and corporations when deciding whether to institute electronic forums should be weighed against a number of potential benefits to shareholder communications and overall corporate performance.

V. CONCLUSION

In conclusion, since the proxy access debate was effectively put on hold by the SEC during the 2008 proxy season, means to improve the quality of corporate elections without amending corporate bylaws and changing corporate election structures should be considered. The development of electronic shareholder forums is notable because these forums possess the potential to enhance the quality of shareholder votes in corporate elections without imposing costs and problems that have been associated with proxy access bylaw amendments. Directors, managers, and shareholders all stand to benefit from innovative initial attempts to integrate electronic forums into structures of corporate governance.

non-binding proposals, and organizing online petitions to management among other potential activities.”).

